

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
WACO DIVISION

3 SPACE EXPLORATION ) Docket No. WA 24-CA-203 ADA  
TECHNOLOGIES CORP. )  
4 )  
vs. ) Waco, Texas  
5 )  
NATIONAL LABOR RELATIONS )  
6 BOARD, ET AL ) July 2, 2024

TRANSCRIPT OF VIDEOCONFERENCE MOTION HEARING  
BEFORE THE HONORABLE ALAN D. ALBRIGHT

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25 Proceedings reported by computerized stenography,  
transcript produced by computer-aided transcription.

14:30:54 1 THE COURT: Good afternoon, everyone.

14:30:55 2 Jen, would you call the case, please.

14:30:57 3 THE CLERK: A civil action in Case 6:24-CV-203,

14:31:02 4 Space Exploration Technologies Corp. vs. National Labor

14:31:05 5 Relations Board, Et Al. Case called for a motions

14:31:07 6 hearing.

14:31:07 7 THE COURT: I'll have announcements from counsel,

14:31:11 8 please.

14:31:15 9 MR. BOEHM: David Boehm for the National Labor

14:31:17 10 Relations Board on behalf of defendants.

14:31:18 11 THE COURT: Is it -- I'm sorry, is it "Bem"?

14:31:23 12 MR. BOEHM: Correct.

14:31:25 13 THE COURT: Thank you, sir.

14:31:26 14 MS. ESCHBACH: Catherine Eschbach on behalf of

14:31:28 15 SpaceX, along with my colleague, Michael Kenneally, who

14:31:31 16 will be handling the argument today.

14:31:32 17 THE COURT: Okay. I thank you all for letting

14:31:34 18 me, on short notice, change the time of the Zoom call. It

14:31:39 19 helped me a lot to be able to have it this afternoon so I

14:31:41 20 appreciate y'all's flexibility.

14:31:43 21 And also, Lily, thank you for being here this

14:31:46 22 afternoon, all-star substitute court reporter who needs no

14:31:53 23 introduction. Otherwise, I'm happy to take the motion up.

14:31:59 24 MR. BOEHM: Thank you, your Honor.

14:32:00 25 Under clear Fifth Circuit precedent, the

14:32:04 1 first-to-file rule requires that when a case shares a  
14:32:06 2 substantial overlap with an existing matter pending before  
14:32:09 3 another district court, the first-filed case takes  
14:32:12 4 precedence and the second-filed case should be stayed,  
14:32:15 5 dismissed, or transferred. The rule exists to avoid  
14:32:17 6 duplicative litigation, to avoid rulings trenching on the  
14:32:21 7 authority of sister courts, and to avoid piecemeal  
14:32:23 8 resolution of issues calling for a uniform result.

14:32:27 9 Calling this case a substantial overlap at the  
14:32:31 10 existing matter in the Southern District would be an  
14:32:34 11 understatement here. The --

14:32:36 12 THE COURT: I'm sorry, where -- which judge has  
14:32:39 13 -- where is it filed in the Southern District?

14:32:42 14 MR. BOEHM: It's at Brownsville. It's Judge  
14:32:45 15 Olvera.

14:32:45 16 THE COURT: Okay. Thank you.

14:32:47 17 MR. BOEHM: So the action's a virtual carbon copy  
14:32:50 18 of two claims from that case involves identical parties  
14:32:54 19 except for an unnamed administrative law judge that's sued  
14:32:58 20 in an official capacity. And here, SpaceX has to win on  
14:33:02 21 the exact same arguments it would have to prevail on in  
14:33:06 22 that first-filed case. And what's more, SpaceX could have  
14:33:09 23 supplemented its pleadings in that case to encompass its  
14:33:12 24 claims here, but perhaps sensing it might not make a  
14:33:15 25 decision it wanted, it decided to try its luck in another

14:33:18 1 court.

14:33:20 2 We believe this is --

14:33:22 3 THE COURT: Wait. What is your basis for saying  
14:33:26 4 that?

14:33:27 5 MR. BOEHM: Well, they filed it in a improper  
14:33:31 6 venue as Judge Olvera found and he issued a decision  
14:33:37 7 transferring that case to California where the locus of  
14:33:43 8 the dispute was, and SpaceX has persistently fought that  
14:33:46 9 decision, including through mandamus petition to the Fifth  
14:33:53 10 Circuit that was ultimately denied by the en banc court.  
14:33:55 11 So it seems as though they have filer's remorse here and  
14:34:00 12 they want to try their luck in a different court that see  
14:34:06 13 if they can get a different result.

14:34:08 14 So our position is that this is not an acceptable  
14:34:11 15 use of judicial resources. It invites the possibility of  
14:34:16 16 the embarrassment of conflicting judgments. And SpaceX  
14:34:21 17 can't muster any convincing argument that the first-filed  
14:34:25 18 rule shouldn't be applied here. I can go into their  
14:34:30 19 arguments if you'd like.

14:34:33 20 THE COURT: I'll give you a chance to respond.  
14:34:35 21 I'll let them make them and then, you'll have whatever  
14:34:37 22 time you want to respond.

14:34:40 23 MR. BOEHM: Okay.

14:34:41 24 THE COURT: But if you have anything else to say,  
14:34:43 25 you're welcome to take as much time as you want to.

14:34:45 1 MR. BOEHM: I mean, the first-to-file rule says  
14:34:49 2 when there's a substantial overlap of issues, the case  
14:34:53 3 should be --

14:34:54 4 THE COURT: Who -- I'm not -- I've not dealt with  
14:35:00 5 this an awful lot. Who determines -- is the job for me to  
14:35:08 6 determine the amount of overlap and if so, what is the  
14:35:12 7 standard I'm supposed to use?

14:35:14 8 MR. BOEHM: So under pretty clear Fifth Circuit  
14:35:20 9 authority, if there's a substantial possibility of  
14:35:24 10 overlap, the second-filed court is the one that -- or the  
14:35:27 11 first-filed court, rather, is the one that should be  
14:35:30 12 deferred to in the case, you know, to determine if both  
14:35:34 13 cases should go forward. We've advocated for a stay here  
14:35:38 14 because there are, at least for the time being, issues  
14:35:43 15 that are holding up that case. We hope to have them  
14:35:45 16 resolved quickly. But we think a stay best accomplishes  
14:35:49 17 the purposes of the rule because once venue is determined  
14:35:53 18 by the first-filed court finally and conclusively, any  
14:35:59 19 transfer can be transferred to the proper court.

14:36:04 20 So, you know, there's no compelling circumstance  
14:36:12 21 that would warrant proceeding with this case and deviating  
14:36:17 22 from a rule that's designed to prevent duplicative  
14:36:21 23 litigation.

14:36:22 24 THE COURT: What about the concern that this is  
14:36:27 25 all just an effort by you all to get this out to a court

14:36:32 1 in California and out of Texas altogether?

14:36:34 2 MR. BOEHM: Well, I mean, I think that's a case  
14:36:39 3 of a hit dog will holler. They were the ones who decided  
14:36:44 4 to file their first case in an improper court as Judge  
14:36:47 5 Olvera found. You know, they sought a venue that was  
14:36:52 6 improper and they have to deal with the results of that  
14:36:55 7 decision. So we are simply applying the standard rules of  
14:37:00 8 litigation and, you know, there's no one responsible for  
14:37:04 9 that but SpaceX and its counsel.

14:37:09 10 THE COURT: You may have responded to my question  
14:37:11 11 and I just didn't hear it. Is the ultimate goal that you  
14:37:16 12 all are trying to accomplish is to get back to California?

14:37:20 13 MR. BOEHM: Well, that all depends on what  
14:37:23 14 happens in the Southern District. If the case is  
14:37:28 15 ultimately not transferred, it's going to have to be taken  
14:37:31 16 up with the Southern District in Judge Olvera's court.  
14:37:34 17 But in any case, this should all proceed in one court and  
14:37:37 18 that's the import of the first-filed rule. You don't get  
14:37:40 19 to maintain essentially the same case under the same legal  
14:37:46 20 issues with unimportant differences against the same  
14:37:55 21 parties.

14:37:58 22 THE COURT: Who determines whether the  
14:37:59 23 differences are unimportant?

14:38:03 24 MR. BOEHM: Under the authorities we laid out in  
14:38:08 25 our papers, the first-filed court should really make that

14:38:13 1 determination once there's a possibility of overlap. So  
14:38:21 2 that's --

14:38:22 3 THE COURT: I'm not following you. So is what  
14:38:24 4 you're telling me, I should stay this and let Judge Olvera  
14:38:29 5 decide whether or not there's overlap? I'm not -- yeah,  
14:38:32 6 I'm sure it's me that's having a problem.

14:38:35 7 MR. BOEHM: I apologize. So I think our position  
14:38:36 8 is until the venue issue is ironed out, this case should  
14:38:41 9 be stayed pending that determination. And then, once it's  
14:38:47 10 decided whether the case is going to remain in Texas or  
14:38:49 11 California, this court should transfer it in accordance  
14:38:53 12 with that determination --

14:38:56 13 THE COURT: Wait, wait. So Judge Olvera's  
14:39:00 14 decision on whether to transfer his case will control  
14:39:03 15 whether I do?

14:39:04 16 MR. BOEHM: Yes. The second-filed court should  
14:39:07 17 normally defer to the first-filed court's determination on  
14:39:11 18 venue.

14:39:13 19 THE COURT: Okay. What if -- is there any  
14:39:16 20 argument on your part that venue is -- let's forget the  
14:39:20 21 first-filed rule for just a second and the order of  
14:39:24 22 filing. Do you have an argument that venue is improper in  
14:39:28 23 Waco?

14:39:30 24 MR. BOEHM: We have not thoroughly examined that  
14:39:34 25 issue. I suspect it may suffer from some of the same

14:39:38 1 infirmities that were true in the Brownsville case. But I  
14:39:41 2 think because the first-filed rule clearly governs here,  
14:39:44 3 we don't have to reach that issue at this point.

14:39:48 4 THE COURT: And what are those venue issues in  
14:39:51 5 Brownsville?

14:39:52 6 MR. BOEHM: Well, the issue we ultimately  
14:39:55 7 prevailed on in the district court was the fact that the  
14:40:02 8 -- a substantial amount -- or a substantial proportion of  
14:40:06 9 the events giving rise to the action did not occur in the  
14:40:10 10 district where they brought the suit where they laid venue  
14:40:13 11 and neither party resided there, and under the applicable  
14:40:17 12 venue provisions, there's no basis for venue in that  
14:40:23 13 district.

14:40:25 14 THE COURT: So if they filed in the Southern --  
14:40:27 15 again, I'm pretty ignorant on this area of the law. I  
14:40:32 16 know some areas very well. Not this one very well. So if  
14:40:37 17 they filed in the Southern District -- and I know you keep  
14:40:38 18 saying they made a mistake, whatever. I'll leave that  
14:40:42 19 alone. But it seems to me, it is beyond argument that  
14:40:50 20 Waco, again, leaving the first-to-file -- I mean, SpaceX  
14:40:55 21 is in Waco so you don't really have an argument that  
14:40:59 22 there's not venue in my -- they don't have venue in my  
14:41:04 23 court, right? I mean, that would be -- can you imagine a  
14:41:06 24 scenario where they would not have venue in my court?

14:41:09 25 MR. BOEHM: I can. If -- the fact that they have

14:41:14 1 a presence in Waco is not sufficient to confer venue over  
14:41:17 2 a dispute. That's essentially a Washington state unfair  
14:41:21 3 labor practice case that's a west coast issue, which this  
14:41:25 4 is. So as I said, we haven't fully --

14:41:28 5 THE COURT: So the fact that -- you know, look,  
14:41:33 6 this isn't -- oh, gosh, I'll pick somebody, this isn't  
14:41:37 7 Acme who has a presence somewhere. SpaceX is in Waco. I  
14:41:41 8 mean, that's -- I mean, in other words, all I'm trying to  
14:41:44 9 make clear so I understand everything is it is -- there's  
14:41:47 10 nothing manufactured -- again, I'm leaving aside the  
14:41:52 11 first-to-file rule. But there's nothing manufactured  
14:41:54 12 about them having filed in Waco, which is -- at least in  
14:41:58 13 terms of where they are located is -- it is the place --  
14:42:06 14 it's very rational from that perspective, is it not? Why  
14:42:08 15 do they have to file where the activities took place? Is  
14:42:13 16 that -- and I'm asking a question. I don't know. Is that  
14:42:15 17 the law?

14:42:16 18 MR. BOEHM: So under the applicable venue  
14:42:18 19 provision, venue's proper where SpaceX resides. That's in  
14:42:24 20 California where their principal place of business is  
14:42:27 21 located where any of the --

14:42:28 22 THE COURT: Is the SpaceX principal place of  
14:42:31 23 location in California or in Waco?

14:42:33 24 MR. BOEHM: California.

14:42:35 25 THE COURT: Okay.

14:42:36 1 MR. BOEHM: So it's proper either where they have  
14:42:38 2 their principal place of business. In the case of  
14:42:41 3 official capacity defendant, it's where they exercise the  
14:42:44 4 duties of their office or it's where, you know, a  
14:42:48 5 substantial portion of the events giving right to the  
14:42:53 6 cause of action arose. So here --

14:42:57 7 THE COURT: Is there a venue statute which  
14:43:00 8 specifically controls? I know in patent law, for example,  
14:43:03 9 there's a specific venue statute. Is there a specific  
14:43:07 10 venue statute that controls this that we can look at that  
14:43:10 11 maybe you cited already?

14:43:14 12 MR. BOEHM: Yeah. Well, I haven't cited it in  
14:43:16 13 this case. Or perhaps I did, actually. It's 28 U.S.C.  
14:43:20 14 1391 is the applicable statute.

14:43:22 15 THE COURT: I'm sorry. 1291?

14:43:24 16 MR. BOEHM: 1391.

14:43:25 17 THE COURT: 1391. Okay. Thank you.

14:43:26 18 MR. BOEHM: Actually, let me look at the papers  
14:43:28 19 just a moment just to make sure.

14:43:29 20 THE COURT: Please do. I mean, there's no hurry  
14:43:31 21 here.

14:43:41 22 MR. BOEHM: Yes, it's 28 U.S.C. 1391. And unlike  
14:43:45 23 patent cases that have virtually unlimited venue  
14:43:47 24 provisions, the venue provisions of that statute are  
14:43:52 25 governed by what's called a perhaps misleadingly

14:43:57 1 transactional venue provision, which involves not simply  
14:44:02 2 transactions but other occurrences, as well. So it does  
14:44:07 3 place limits on a court's venue. It's not virtually  
14:44:10 4 unlimited as it would be in a patent case.

14:44:14 5 THE COURT: Did you -- I may have just  
14:44:17 6 misunderstood you. Did you say that patent venue is  
14:44:19 7 virtually unlimited?

14:44:21 8 MR. BOEHM: I probably misspoke there. I'm sorry  
14:44:23 9 but it's -- I know the venue provisions are quite liberal  
14:44:26 10 in patent cases.

14:44:27 11 THE COURT: It's just the opposite. Have you  
14:44:29 12 seen TC Heartland? I mean, that's exactly the opposite of  
14:44:34 13 what they are. They're extremely not -- they're extremely  
14:44:37 14 limited.

14:44:38 15 MR. BOEHM: Well, I apologize.

14:44:42 16 THE COURT: Okay. Very good. I do know a little  
14:44:45 17 bit about the patent venue laws. So is there anything  
14:44:50 18 else you care to say?

14:44:52 19 MR. BOEHM: I can address their arguments in  
14:44:57 20 rebuttal, I suppose, but nothing that they've laid out  
14:45:01 21 provides a compelling reason not to apply this  
14:45:04 22 well-settled rule.

14:45:05 23 THE COURT: Okay. Got it.

14:45:07 24 A response.

14:45:09 25 MR. KENNEALLY: Thank you, your Honor. And may

14:45:10 1 it please the Court.

14:45:11 2 Defendants' motion, respectfully, would turn the  
14:45:15 3 first-to-file doctrine on its head because rather than  
14:45:18 4 promote comity between courts or judicial efficiency,  
14:45:22 5 defendants are really just proposing to block SpaceX from  
14:45:25 6 obtaining any of the relief it's seeking in this action  
14:45:29 7 for an indefinite period of time. Defendants never argue,  
14:45:33 8 nor could they, that the Southern District case is  
14:45:36 9 positioned to grant any relief for the administrative  
14:45:39 10 proceeding at issue here. Those two actions, the Southern  
14:45:43 11 District action and this action, are asking for relief  
14:45:46 12 with respect to different NLRB proceedings brought in  
14:45:52 13 different regions of the NLRB's geographic offices; and  
14:45:56 14 therefore, there's nothing in the Southern District case  
14:45:58 15 that would provide the preliminary injunction that SpaceX  
14:46:03 16 has moved for here or even permanent relief with respect  
14:46:08 17 to the proceeding that's at issue here.

14:46:11 18 Nor would defendants' proposal expedite or  
14:46:14 19 facilitate any ruling on SpaceX's preliminary injunction  
14:46:17 20 motion in this case or its claims in this case, and that's  
14:46:21 21 because the Southern District case is effectively on hold  
14:46:25 22 in that court while the Fifth Circuit considers SpaceX's  
14:46:30 23 appeal from that court's denial of the preliminary  
14:46:33 24 injunction that SpaceX requested there.

14:46:35 25 So that is why defendants are making the somewhat

14:46:39 1 unusual request here not to transfer this case for now at  
14:46:44 2 least but, instead, to stay the case so that they can  
14:46:47 3 decide at some future date whether they want to ask for  
14:46:49 4 transfer, whether they want to move to dismiss for  
14:46:52 5 improper venue, whatever else they want to do. And that  
14:46:56 6 is exactly the opposite of the attempt to limit piecemeal  
14:47:00 7 litigation that the first-to-file rule is meant to  
14:47:02 8 promote.

14:47:03 9 It's also notable that the defendants have not  
14:47:06 10 asked for a stay pending resolution of Fifth Circuit  
14:47:09 11 appeal. They haven't argued -- they certainly haven't  
14:47:14 12 conceded that a preliminary injunction in that case would  
14:47:16 13 be controlling in this one. If the two cases  
14:47:19 14 substantially overlapped, however, that shouldn't be a  
14:47:21 15 hard concession to make. Instead, both parties seem to  
14:47:26 16 recognize that these are separate cases arising from  
14:47:29 17 separate administrative proceedings. And if the stay  
14:47:32 18 motion that the defendants have made is granted here, then  
14:47:37 19 there won't be any ruling on SpaceX's request for  
14:47:40 20 preliminary injunctive relief for the foreseeable future,  
14:47:44 21 at least until the Fifth Circuit appeal plays out.

14:47:47 22 And by defendants' own concession, they have no  
14:47:49 23 way of knowing when that will happen or when the venue  
14:47:52 24 determination that they're hoping for in the Southern  
14:47:55 25 District to get that case into California might actually

14:47:58 1 happen. They say on page 9 of their motion, it's unclear  
14:48:03 2 at present when such a ruling would occur and that's quite  
14:48:05 3 right. In fact, as SpaceX has argued, that may never  
14:48:09 4 happen because the Fifth Circuit could still provide  
14:48:10 5 guidance on the venue question in the Southern District  
14:48:13 6 case and may reverse the district court's conclusion,  
14:48:17 7 which only escaped en banc review in a writ of mandamus  
14:48:22 8 posture by an eight-to-eight vote.

14:48:23 9 So it's very much a close question whether venue  
14:48:27 10 is proper in that case and the Fifth Circuit may still  
14:48:30 11 weigh in on that because, according to defendants, the  
14:48:33 12 Southern District of Texas cannot afford a preliminary  
14:48:36 13 injunction having ruled that it lacks venue. So that's  
14:48:39 14 very much a live issue in that pending Fifth Circuit  
14:48:42 15 appeal.

14:48:42 16 And defendants haven't argued that there's really  
14:48:46 17 a meaningful risk of conflicting rulings between the two  
14:48:49 18 cases as we've pointed out in our opposition. In fact,  
14:48:52 19 they mostly argue that they don't need to make such a  
14:48:56 20 showing under the first-to-file rule and they accuse us of  
14:48:59 21 misquoting the Save Power case from the Fifth Circuit,  
14:49:04 22 which, in turn, quoted from a First Circuit case called  
14:49:07 23 TPM Holdings. And the quote there, which I think goes  
14:49:10 24 exactly to the question your Honor posed to Mr. Boehm  
14:49:14 25 about who's supposed to decide whether there's substantial

14:49:17 1 overlap and if so, on what basis, there the court, the  
14:49:21 2 Fifth Circuit recognized that where the overlap between  
14:49:24 3 two suits is less than complete, the judgment is made  
14:49:28 4 case-by-case based on such factors as the extent of  
14:49:32 5 overlap, the likelihood of conflict, the comparative  
14:49:36 6 advantage, and the interest of each forum in resolving  
14:49:38 7 this dispute.

14:49:39 8 And the Fifth Circuit, contrary to defendants'  
14:49:43 9 portrayal, has since reaffirmed that rule in the  
14:49:46 10 International Fidelity Insurance case that both sides  
14:49:48 11 discussed. And then, district courts in this circuit have  
14:49:52 12 applied it, as well, including some of the cases we cited,  
14:49:54 13 Louisiana vs. Biden from the Western District of  
14:49:58 14 Louisiana, and Hart vs. Donostia from the Western District  
14:50:02 15 of Texas, and defendants did not grapple with those  
14:50:05 16 courts' invocation of this same standard.

14:50:08 17 Here, we don't think there is a meaningful risk  
14:50:11 18 of conflicting rulings because the two cases target  
14:50:14 19 different NLRB proceedings. And the NLRB concedes in  
14:50:19 20 footnote 8 on page 5 of its reply brief that it could  
14:50:23 21 comply with an injunction in one case even if the other  
14:50:26 22 case isn't enjoined. So the NLRB hasn't argued either  
14:50:30 23 that the Southern District has a greater interest or  
14:50:33 24 ability than this court in resolving the dispute. If  
14:50:36 25 anything, the NLRB has always argued that the Southern

14:50:40 1 District shouldn't be resolving either case.

14:50:41 2 So in all these ways, defendants are attempting

14:50:44 3 to use the first-to-file doctrine for strategic advantage

14:50:47 4 and it would not promote judicial efficiency and comity to

14:50:51 5 do what they're asking this court to do and indefinitely

14:50:54 6 stay these proceedings. We don't think that the

14:50:56 7 substantial overlap necessary to invoke the first-to-file

14:50:59 8 doctrine is present here.

14:51:01 9 But even if there were substantial overlap, we

14:51:03 10 think there are compelling circumstances for this court to

14:51:06 11 exercise its discretion not to apply the doctrine and

14:51:08 12 certainly not to stay this case indefinitely because by

14:51:12 13 the NLRB's own admission, staying the case will

14:51:14 14 indefinitely postpone any resolution of SpaceX's timely

14:51:18 15 filed motion for preliminary injunction. The Southern

14:51:22 16 District proceedings, as I noted, are effectively on pause

14:51:24 17 pending the Fifth Circuit's disposition of our appeal and

14:51:28 18 that is -- that appeal's still in its early briefing phase

14:51:32 19 and could take many more months to be fully resolved.

14:51:34 20 And the NLRB could reschedule the hearing in this

14:51:38 21 case anytime it chooses. It didn't withdraw its complaint

14:51:42 22 or dismiss the charge against SpaceX; instead, it sort of

14:51:47 23 left the case in limbo and presents the risk that if the

14:51:50 24 NLRB unilaterally decides to put the hearing back on its

14:51:55 25 calendar, the parties will have to rush back into court on

14:51:58 1 an emergency timeline and ask for a lifting of a stay, a  
14:52:02 2 renewal of the request for preliminary injunctive relief,  
14:52:04 3 and who knows what else, all on a highly expedited  
14:52:07 4 timetable potentially. And there's no reason to do that  
14:52:10 5 when here, there's a fully briefed preliminary injunction  
14:52:13 6 motion that's already before the Court.

14:52:17 7 I think it's also important to underscore that  
14:52:19 8 the cases that the NLRB is relying on here involves quite  
14:52:23 9 different circumstances where there were, in fact, serious  
14:52:26 10 risks of conflicting judicial rulings. In West Gulf,  
14:52:30 11 there was an intrusion by the second court on the first  
14:52:33 12 court's authority because the core issue in both cases was  
14:52:38 13 the same, whether a particular arbitrable decision in a  
14:52:41 14 labor arbitration was valid, and the second court had  
14:52:45 15 issued an injunction that was inconsistent with the first  
14:52:47 16 court's ruling on that -- on that question of the validity  
14:52:50 17 of the arbitrable decision.

14:52:52 18 In Mann Manufacturing, the second court similarly  
14:52:55 19 interfered with the first court's authority. In  
14:52:57 20 particular, the first court's continuing power to  
14:53:00 21 supervise an injunction that it had already issued. In  
14:53:03 22 Save Power, there was another possible risk of conflicting  
14:53:06 23 injunctions and the courts had, in fact, both courts had  
14:53:10 24 already issued rulings on a creditor's entitlement to  
14:53:14 25 foreclose on a particular debtor's assets that were

14:53:18 1 reconcilable.

14:53:19 2 And then, most recently, in the Chamber Of  
14:53:21 3 Commerce case from the Eastern District of Texas, you had  
14:53:24 4 two cases challenging the same FTC rule, the same agency  
14:53:29 5 action, and in both those cases, the relief sought was  
14:53:32 6 identical. Both plaintiffs wanted that rule vacated in  
14:53:36 7 its entirety and had that been granted in either case, it  
14:53:40 8 would have redounded to the benefit of both plaintiffs.  
14:53:43 9 And the second court in that case was encouraging the  
14:53:46 10 plaintiff to intervene in the first action because it  
14:53:49 11 would have provided the relief that that plaintiff was  
14:53:52 12 seeking.

14:53:53 13 Here again, there's nothing that the Southern  
14:53:55 14 District can currently do to rule on SpaceX's preliminary  
14:53:59 15 injunction motion or resolve the underlying claims while  
14:54:03 16 those issues are up on appeal in the Fifth Circuit. And  
14:54:07 17 to Mr. Boehm's argument that it was improper for us not to  
14:54:13 18 amend the complaint in the Southern District of Texas, to  
14:54:17 19 me, that sounds like a pretty odd suggestion given that  
14:54:19 20 the Court there had found that it lacked proper venue.

14:54:23 21 So the argument would be we were supposed to  
14:54:25 22 amend the complaint to add a claim where the Court lacked  
14:54:28 23 proper venue rather than file in a court which I think  
14:54:31 24 clearly has venue. And in that case, again, we had  
14:54:35 25 already moved at the time we filed this action for

14:54:38 1 reconsideration of the venue decision and there was no  
14:54:41 2 telling when the district court there was going to grant  
14:54:44 3 that motion, act on it one way or the other.

14:54:47 4 So the idea that we had to add this case into  
14:54:51 5 that case despite the huge question mark about what the  
14:54:56 6 status of that case was going to be going forward, I  
14:54:59 7 think, is unrealistic. And finally, the NLRB argues on  
14:55:04 8 pages 5 through 6 of its reply that if we prevail on this  
14:55:08 9 motion, parties would be able to dodge the first-to-file  
14:55:11 10 doctrine in any case. That simply isn't true. A party  
14:55:15 11 can't file actually identical lawsuits over and over again  
14:55:19 12 and SpaceX does not argue otherwise.

14:55:21 13 Here, however, the NLRB made the decision to  
14:55:24 14 initiate a wholly separate administrative proceeding  
14:55:27 15 against SpaceX in a different part of the country  
14:55:30 16 involving different underlying allegations, and in doing  
14:55:33 17 so, it created a new dispute between the parties and it  
14:55:37 18 opened the door to a new lawsuit, as well. I'd be happy  
14:55:42 19 to address any questions that your Honor has.

14:55:46 20 THE COURT: A response.

14:55:49 21 MR. BOEHM: Certainly. Counsel seems to admit  
14:55:57 22 that the purpose of this lawsuit was to get a second bite  
14:55:59 23 of the apple because the first case was not proceeding to  
14:56:05 24 their liking. As to the suggestion that amending the  
14:56:11 25 pleadings or supplementing the pleadings would have been a

14:56:16 1 problem, the first-filed rule teaches us that the  
14:56:21 2 propriety of venue or even jurisdiction in the first-filed  
14:56:24 3 court is not a consideration under the rule.

14:56:26 4 So if they believed that they were in the right  
14:56:28 5 court, they should have stuck to their position and  
14:56:32 6 litigated all these claims in one case before one court.

14:56:37 7 As to the issue of the preliminary injunction,  
14:56:41 8 you know, that issue is not the subject of this hearing.  
14:56:43 9 But I will say with regard to their concerns that we could  
14:56:47 10 reschedule the hearing anytime, I can represent to the  
14:56:50 11 Court that in no case will the hearing proceed before the  
14:56:53 12 original October hearing date. So any sort of unfounded  
14:56:59 13 speculation that we were going to pull a fast one and  
14:57:00 14 schedule it, you know, I'm sure notice is not something  
14:57:05 15 the Court should be concerned about.

14:57:08 16 The other thing I would note is that, you know,  
14:57:12 17 the issue of a stay versus a transfer was one that was  
14:57:16 18 confronted in the Chamber Of Commerce case that they  
14:57:19 19 discussed and the Court ultimately decided the stay was  
14:57:22 20 proper in that case. So I don't think it's a unusual  
14:57:25 21 request as they've characterized it. I think, you know,  
14:57:29 22 there are circumstances that warrant it and cases where  
14:57:31 23 there's confusion about where a case should proceed might,  
14:57:37 24 you know -- is -- was one of the circumstances where a  
14:57:40 25 stay, at least until those issues are ironed out, makes

14:57:44 1 sense.

14:57:48 2 In terms of there's no threat of conflicting  
14:57:51 3 judgments, I think the illogic of that speaks for itself  
14:57:54 4 that this is a -- these two claims are a virtual carbon  
14:58:00 5 copy of the claims in SpaceX 1 and a decision in one court  
14:58:04 6 would be preclusive on the other as between the same  
14:58:06 7 parties. The fact that they arise from different  
14:58:10 8 administrative proceedings is under the first-filed rule  
14:58:15 9 of no import because what we're supposed to look at is  
14:58:17 10 what they have to prove in each case. And the vagaries of  
14:58:23 11 the particular administrative law judge, you know, who's  
14:58:27 12 deciding the case are not important to the ultimate issues  
14:58:29 13 before this court. And the first-filed rule's very clear  
14:58:34 14 that the case does not have to be identical, a substantial  
14:58:39 15 overlap is sufficient.

14:58:41 16 And in fact, in the West Power case that they  
14:58:44 17 discussed, a preliminary injunction which wasn't a final  
14:58:50 18 judgment was sufficiently intrusive on this -- on the  
14:58:54 19 other court's authority that it came within the  
14:58:59 20 prohibition of the first-filed rule. As to the sort of  
14:59:08 21 issue of the appeal holding up the case, we have proposed  
14:59:12 22 a solution that would obviate any need to prosecute the  
14:59:16 23 appeal. We've asked for indicative ruling -- for an order  
14:59:20 24 that would enjoin the administrative proceeding at issue  
14:59:23 25 in the first-filed case. We did that so that we could

14:59:26 1 move that case towards final judgment, which is something  
14:59:29 2 that SpaceX seems to be persistently avoiding. SpaceX has  
14:59:37 3 fought us on that note too even though the relief we've  
14:59:40 4 offered through that order would give them everything they  
14:59:42 5 would get through a successful appeal, and probably more  
14:59:44 6 because it would be -- we'd be precluded from further  
14:59:48 7 challenge to it, but they have not cooperated with that  
14:59:54 8 effort. They seem intent on litigating that to the hilt.

15:00:01 9  
15:00:17 10 And let's see. And just they'd mentioned the  
15:00:19 11 Save Power case, that case is very clear that the  
15:00:24 12 first-filed court is the one that has the ultimate say  
15:00:27 13 over whether both cases should go forward. So I think we  
15:00:32 14 should preserve that court's ability to adjudicate the  
15:00:39 15 issues before it and we ask the Court issue a stay or, you  
15:00:42 16 know, if it decides dismissal or transfer is proper, we  
would not oppose that, as well.

15:00:46 17 THE COURT: Any response?

15:00:48 18 MR. KENNEALLY: Thank you, your Honor.

15:00:52 19 You know, I think the one thing that came through  
15:00:55 20 clearly is that there isn't a way for SpaceX to get a  
15:01:01 21 ruling on its preliminary injunction motion that's already  
15:01:04 22 briefed. And the representation that it won't go back on  
15:01:08 23 the calendar before the end of October isn't a lot of  
15:01:12 24 comfort given how fast moving the parties would need to be  
15:01:18 25 and the courts would need to be to issue a ruling in just

15:01:22 1 under a few months if that were to happen. We don't know  
15:01:24 2 when it would go on the calendar and these actions, both  
15:01:29 3 of them have seen a lot of motions practice already. So I  
15:01:34 4 think that the issuance of the stay really just runs the  
15:01:37 5 risk of more fast-moving motions practice later on.

15:01:40 6 The Save Power case, I disagree, says that only  
15:01:44 7 the first court decides whether there's substantial  
15:01:48 8 overlap. What the Court was saying there is that once the  
15:01:51 9 second court finds that there is substantial overlap,  
15:01:55 10 which would be something that this court would need to  
15:01:58 11 determine about this case, then whether the second case  
15:02:02 12 should move forward is presumptively an issue for the  
15:02:06 13 first court to resolve. But here, as we've argued, there  
15:02:08 14 isn't enough substantial overlap because the two cases  
15:02:11 15 deal with separate NLRB proceedings. Other than that,  
15:02:17 16 your Honor, I don't have a further response.

15:02:22 17 THE COURT: Very good. I'll be back in a few  
15:02:24 18 minutes.

15:07:06 19 Okay. The issue before the Court is whether or  
15:07:11 20 not to stay the case. The Court is not going to stay the  
15:07:14 21 case. I am going to set it for a preliminary injunction  
15:07:16 22 hearing. I think I'm free next week. Is there a date  
15:07:23 23 next week that works particularly well for you? Well,  
15:07:26 24 actually, my clerk will reach out to you and we'll get a  
15:07:29 25 date and we could do that.

15:07:31 1           What I would ask the parties to do -- and I may  
15:07:33 2 butcher the name. I apologize in advance. But we're  
15:07:38 3 aware and y'all are, too, I'm certain, of the SEC vs.  
15:07:43 4 Jarkesy, or J-A-R-K-E-S-Y, case. If there's any briefing  
15:07:48 5 you want to do based on what was held in that case for us,  
15:07:52 6 that would be extremely helpful. We think it's relevant  
15:07:54 7 to what we're going to do.

15:07:56 8           Having said that, is there anything else we need  
15:07:58 9 to take up at this time?

15:08:06 10           MR. KENNEALLY: Not from our perspective, your  
15:08:09 11 Honor.

15:08:09 12           MR. BOEHM: Just as a housekeeping matter in  
15:08:10 13 terms of the scheduling, is the case manager going to  
15:08:13 14 reach out to us about a time?

15:08:14 15           THE COURT: Yes.

15:08:15 16           MR. BOEHM: Okay.

15:08:16 17           THE COURT: Yeah. I've got a great staff and so,  
15:08:20 18 maybe as early as today. But no. We do our best to try  
15:08:23 19 and accommodate y'all's schedules if we can but I would --  
15:08:27 20 I plan on doing it next week for sure. So my clerks are  
15:08:34 21 texting me. I don't really have a case manager. I have  
15:08:36 22 four phenomenal clerks so one of them will be reaching out  
15:08:40 23 to you and getting it arranged.

15:08:43 24           MS. ESCHBACH: And, your Honor, should we plan  
15:08:45 25 for that to be in person or will it likely be over Zoom?

15:08:49 1                   THE COURT: I'm happy to do it by Zoom. I'm  
15:08:52 2 happy to do it -- next week, I am mostly in Austin. I'm  
15:08:58 3 in Austin, I think, Monday, Thursday and Friday and then,  
15:09:01 4 Waco, Tuesday in a hearing and Wednesday in sentencings.  
15:09:05 5 So, you know -- but why don't we plan on doing this.  
15:09:10 6 Let's plan on doing it -- my clerks said the best time for  
15:09:13 7 us, our availability is in Waco, next Wednesday afternoon.  
15:09:20 8 Let's plan on doing it at 2:00 in the afternoon next  
15:09:23 9 Wednesday in person.

15:09:28 10                   Anything else? Okay. I hope you guys have a  
15:09:36 11 happy 4th of July. Take care. We'll see you next week.

15:09:40 12                   MR. BOEHM: Thank you, your Honor.

13                   (Proceedings concluded.)

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3 UNITED STATES DISTRICT COURT )

**4** | WESTERN DISTRICT OF TEXAS )

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6 I, LILY I. REZNIK, Certified Realtime Reporter,  
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15 WITNESS MY OFFICIAL HAND this the 19th day of July,  
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